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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

THEODORE CHARLES WHIGHT,

Defendant and Appellant.

C086390

(Super. Ct. No. 16CF01575)

Following a bench trial, defendant Theodore Charles Whight was convicted of failing to annually update sex offender registration (Pen. Code, § 290.012, subd. (a))¹ and failing to report a change of address as a sex offender (§ 290.013, subd. (a)) with a prior strike (§§ 667, subd. (b)-(i), 1170.12). The trial court struck the strike prior and

¹ Undesignated statutory references are to the Penal Code.

sentenced defendant to two years eight months in state prison with 913 days of presentence credit (609 actual and 304 conduct).

On appeal, defendant contends the trial court lacked jurisdiction to proceed against him because he was in Arizona when the crimes allegedly were committed, and trial counsel was ineffective in failing to seek dismissal of the complaint on jurisdictional grounds. The People agree that the judgment must be reversed. Finding insufficient evidence to support the convictions, we reverse.

BACKGROUND

No testimony was taken at the bench trial on the instant offenses; the prosecution relied entirely on documentary evidence.

On April 9, 1986, a jury in Butte County found defendant guilty of three counts of lewd and lascivious conduct with a child under the age of 14 (§ 288, subd. (a)). Defendant was paroled from Mule Creek State Prison in 1990 and signed a form acknowledging his duty to register as a sex offender under section 290.

After being convicted of other, unrelated crimes, defendant was scheduled to be paroled from Ironwood State Prison in Blythe in August 1996. Upon his parole on September 16, 1996, defendant signed another form acknowledging the registration requirement. His address was listed on the form as “TO BE DETERMINED.”

On May 5, 2016, defendant was arrested in Arizona on an outstanding California parole warrant and returned to Butte County. Since his release from prison in 1996, there is no record of defendant registering as a sex offender in California nor filing a change of address form. No evidence was introduced at trial regarding when defendant left California.

DISCUSSION

Defendant contends that his convictions for violating section 290.012, subdivision (a) and section 290.013, subdivision (a) must be reversed. The Attorney General concedes that defendant's convictions should be reversed because there was no evidence he was in California when he was alleged to have committed either offense. We agree.

Count 1: Annual Registration

Count 1 of the complaint against defendant charged: "On or about and between February 26, 1997 and February 26, 2016, [in Butte County], the crime of FAILURE TO UPDATE REGISTRATION ANNUALLY, in violation of PENAL CODE SECTION 290.012(a),^[2] a Felony, was committed by [defendant], who being a person required to update registration annually, within 5 working days of his or her birthday"

In People v. Wallace (2009) 176 Cal.App.4th 1088 (*Wallace*), the defendant was convicted of failing to notify appropriate authorities within five working days of his new address or location, failing to register within five days of changing his address or location, and failing to complete his annual registration even though there was no evidence of defendant's whereabouts after he left his last address. (*Id.* at pp. 1091, 1103.) Interpreting the same language in section 290 that limits registration to residents of California (see *Wallace, supra*, at p. 1100 [applying § 290, former subd. (a)(1)(A)]), the *Wallace* court held that if the defendant left California after vacating his last registered address, "his failure to register a new address or location anywhere in California within five working days would not amount to a violation of this provision." (*Wallace, supra*, at p. 1103.) The same reasoning applied to the crime of failing to complete the annual

² Section 290.012, subdivision (a) provides in pertinent part: "Beginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration"

registration. Since the duty to register required California residency, the crime of failing to update annual registration could be committed only if the defendant resided in California at the time of the alleged offense. (*Id.* at pp. 1105-1107.) The lack of evidence regarding his California residency at the time of the offense mandated reversal of the two convictions. (*Id.* at pp. 1107-1108.)

The reasoning in *Wallace* applies equally here to compel the reversal of defendant's conviction for failing to update his annual registration after his release from prison in 1996.

The duty to register as a sex offender arises only when the person subject to registration resides in California. As *Wallace* establishes, in a prosecution for failing to register annually as a sex offender, the prosecution must establish that the defendant resided in California at the time of the alleged offense. (*Wallace*, 176 Cal.App.4th at p. 1105.)

Here, the evidence showed that defendant was incarcerated in Riverside County, California, until September 1996. Defendant's date of birth is February 15. Under section 290.012, subdivision (a), defendant would have had to update his annual registration within five working days of February 15, 1997, so long as he was residing in California. (See *Wallace, supra*, 176 Cal.App.4th at p. 1105.) There was no evidence introduced, however, of defendant's residence or domicile from September 1996 until he was arrested in Arizona on May 5, 2016. Without evidence that defendant resided in California at any point between February 26, 1997, and February 26, 2016, as alleged by the prosecution, his conviction under section 290.012, subdivision (a) for failing to update his annual registration during this time must be reversed.

Count 2: Change of Address Notification

In count 2, the prosecution alleged that “[o]n or about April 30, 2016, [within Butte County], the crime of FAILURE TO FILE A CHANGE OF ADDRESS, in

violation of PENAL CODE SECTION 290.013(a), a Felony, was committed by [defendant]”

Defendant contends his conviction on this count also should be reversed. The People agree that judgment must be reversed. Because the evidence presented did not establish when defendant left the state, and thus whether defendant was on notice to inform California authorities about his move, we agree.

In a prosecution under section 290, a defendant must be charged with the version of the statute in effect at the time he committed the alleged offense. (See *People v. Garcia* (2001) 25 Cal.4th 744, 750.) Here, defendant was charged with failing to inform his last registering agency of a new address presumably based upon his relocation from California to Arizona in alleged violation of section 290.013, subdivision (a). Although the date of the offense was alleged to be “[o]n or about April 30, 2016,” no evidence was introduced regarding when defendant left California, only that he was released from prison in 1996 and arrested in Arizona on May 5, 2016.

At the time of defendant’s release from prison in 1996, section 290, subdivision (f) provided: “If any person who is required to register pursuant to this section changes his or her residence address, the person shall inform, in writing within 10 days, the law enforcement agency or agencies with whom he or she last registered of the new address.” (Stats. 1995, ch. 85, § 1, p. 214.) Hence, there was no clear requirement that a registrant inform authorities of an address change if he was moving outside California.

Effective January 1, 1999, section 290, subdivision (f) was amended and provided: “If any person who is required to register pursuant to this section changes his or her residence address or location, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction *inside or outside the state*, the person shall inform, in writing within five working days, the law enforcement agency or agencies with which he or she last registered of the new address or location. . . .” (Stats. 1998, ch. 929,

§ 1, p. 6253, italics added.) Thus, section 290, subdivision (f)(1)³ was amended to expressly require a registrant to notify authorities whenever he changes his address within or without the state.

Nothing in section 290 before the amendment, however, established that the act required registrants moving out of state to file a change of address form. This is confirmed by *People v. Franklin* (1999) 20 Cal.4th 249. Franklin was convicted of sex offenses in 1985 and after initially registering in 1989, failed to file a change of address with California authorities when he moved to Texas in 1995. (*Id.* at p. 252.) Like defendant, Franklin was returned to California and convicted of violating section 290 based solely on his failure to file a change of address with California authorities upon leaving California. (*Franklin, supra*, at p. 252.) The California Supreme Court reversed Franklin’s conviction, finding that the 1995 version of section 290 was ambiguous regarding “application to persons . . . who move to another state.” (*Id.* at p. 255.)

Because a prosecution for a section 290 violation must be charged under the version of statute in effect at the time of the alleged violation, the absence of evidence as to when defendant left California is significant. If evidence were introduced establishing that defendant left California between 1996 and the end of 1998, *Franklin* holds that section 290, subdivision (f), would not require him to inform California authorities upon leaving the state and his conviction may not be upheld. If, on the other hand, the prosecution had adduced evidence that defendant left California after January 1, 1999, defendant might have been under a duty to inform California authorities that he was leaving the state.⁴ As the record stands, however, the prosecution established only that defendant was released from prison in 1996, that his address at the time he was

³ Section 290, former subdivision (f)(1) later was renumbered as section 290.013. (Stats. 2007, ch. 579, § 21, p. 4818, eff. Oct. 13, 2007.)

⁴ We express no opinion on this issue or any potential statute of limitations defenses.

released was “TO BE DETERMINED,” and that he was residing in Arizona at the time of his arrest. As such, insufficient evidence supports the judgment on count 2.

The prosecution has the burden of proving beyond a reasonable doubt every element of the charged offense. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) Since there is no evidence establishing that defendant resided in California at the time of the alleged offenses (see *Wallace, supra*, 176 Cal.App.4th at pp. 1103, 1105), or regarding when defendant moved out of California, the convictions on both counts must be reversed. In light of this ruling, we decline to address the ineffective assistance of counsel contention.

DISPOSITION

The judgment of conviction on counts 1 and 2 is reversed for insufficient evidence.

KRAUSE, J.

We concur:

BUTZ, Acting P. J.

HOCH, J.